Legentheraj a/l Asogan v Public Prosecutor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS B-05(M)-6–01 OF 2020 AND B-05(SH)-8–01 OF 2020
KAMALUDIN MD SAID, AHMAD NASFY AND AZMAN ABDULLAH JJCA
21 FEBRUARY 2023

Criminal Law — Appeal — Appeal against conviction and sentence — Maximum evaluation of case by trial judge — Trafficking in dangerous drugs — Custody and control of drugs — Appellant charged with trafficking in cannabis — Trial judge convicted appellant and sentenced appellant to death — Whether trial judge failed to conduct maximum evaluation of key prosecution witnesses — Whether custody and control of drugs established — Whether room where drugs found accessible by others — Whether appellant succeeded in raising reasonable doubt — Dangerous Drugs Act 1952 s 39B(1)(a)

There were two charges against the appellant ie trafficking in cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') ('the first charge') and possession of cannabis under s 6 of the DDA ('the second charge'). In relation to the first charge, the cannabis was found in the third room of an apartment located in Sepang, Selangor ('the house'). For the second charge, based on the evidence of the raiding officer ('SP7'), the cannabis was found in the appellant's pockets. Prior to the discovery of the drugs in the house and in the appellant's possession, SP7 testified that he saw the appellant came out of the house. The house was rented by the appellant's friend, SP6 who testified that he had given the house's keys to the appellant before he went to Johor on 10 May 2017. It ought to be noted that the appellant was arrested at the house on 15 May 2017. In defence, the appellant contended that: (a) he had no keys to the house; (b) he did not give direction to the place that the drugs were found; (c) he did not live in that house and he only knew that his friend SP6 rented the third room in the house; (d) he did not keep any drugs on his body; and (e) at the time of the arrest, he was not alone, there were two Arab males and one of them had opened the door of the house. At the end of the trial, the learned trial judge found that the appellant's defence was a mere denial and accordingly, the appellant was found guilty of both charges. The appellant was sentenced to death for the first charge and for the second charge, the appellant was sentenced to two years imprisonment and three strokes of whipping. Initially, the appellant had filed an appeal against the decision in relation to both the chrges but subsequently, the appellant withdrawn his appeal against the learned trial judge's decision in respect of the second charge. Hence, the present appeal was only related to the learned trial judge's decision in respect of the first charge. The appellant submitted that: (i) the learned trial judge failed

to conduct maximum evaluation of key prosecution witnesses; and (ii) the prosecution was unable to prove custody and control of the drugs seized in the third room considering that there were possibility of access by others to the said room.

Held, allowing the appeal, setting aside the order of the High Court and acquitting and discharging the appellant:

(1) The court agreed with the appellant that the learned trial judge failed to conduct maximum evaluation of key prosecution witnesses. The learned judge had much relied on the evidence of SP6 who was in fact the tenant of the house and therefore there was a possibility of SP6 having a motive when giving the evidence as the prosecution witness. There was no evidence to corroborate the fact that SP6 indeed left for Johor on 10 May 2017 and was still in Johor at the time when the appellant was arrested. There was also no evidence which could prove that the appellant had collected the key from SP6 to corroborate SP6's evidence that he gave the keys to the house to the appellant near the guardhouse of the apartment (see paras 34 & 36).

(2) The evidence of SP6 ought to be carefully evaluated since he may have the motive based on the fact that he was the one who rented the house. If the drugs belonged to him, he would come out with the story which could save himself. In addition, the DNA report concerning the third room showed that there were two male contributors to the DNA from which the appellant was excluded. Based on the above findings, the court found that the defence had succeeded in raising a reasonable doubt which rendered the conviction of the appellant unsafe (see paras 37–38).

(3) It was trite that the onus was on the prosecution to exclude the possibility of access by others to the place where the drugs were discovered. In the present case, the fact that the house was rented by many individuals who could go in and out without any control and supervision should not be taken for granted. Besides, there was no fingerprint analysis conducted by the police with regard to the drugs seized. The fingerprint analysis was very important to show the nexus of the drugs with the appellant and that would help the prosecution case in eliminating the possibility of access by others to the place of discovery especially in the present case whereby at the time when the appellant was arrested, there were two Arab males who were also arrested at the house and this fact was corroborated with the evidence from SP7 and the arrest report. Based on the above findings, the court found that the appellant had raised a reasonable doubt against the prosecution case in their defence on the issue of custody and control (see paras 39–41).

[Bahasa Malaysia summary

Terdapat dua pertuduhan terhadap perayu iaitu mengedar ganja di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') ('pertuduhan pertama') dan memiliki ganja di bawah s 6 ADB ('pertuduhan kedua'). Berhubung dengan pertuduhan pertama, ganja tersebut ditemui di dalam bilik ketiga sebuah pangsapuri yang terletak di Sepang, Selangor ('rumah tersebut'). Bagi pertuduhan kedua, berdasarkan keterangan pegawai serbuan ('SP7'), ganja tersebut ditemui di dalam poket perayu. Sebelum penemuan dadah di dalam rumah dan dalam milikan perayu, SP7 memberi keterangan bahawa dia melihat perayu keluar dari rumah tersebut. Rumah tersebut disewa oleh rakan perayu, SP6 yang memberi keterangan bahawa dia telah memberikan kunci rumah kepada perayu sebelum dia pergi ke Johor pada 10 Mei 2017. Perlu diingat bahawa perayu telah ditangkap di rumah tersebut pada 15 Mei 2017. Dalam pembelaan, perayu berhujah bahawa: (a) dia tidak mempunyai kunci rumah tersebut; (b) dia tidak menunjukkan arah ke tempat dadah tersebut ditemui; (c) dia tidak tinggal di rumah tersebut dan dia hanya tahu bahawa rakannya SP6 menyewa bilik ketiga di rumah tersebut; (d) dia tidak menyimpan apa-apa dadah pada badannya; dan (e) semasa ditangkap, dia tidak bersendirian, terdapat dua lelaki Arab dan seorang daripada mereka telah membuka pintu rumah tersebut. Pada akhir perbicaraan, hakim bicara yang bijaksana mendapati bahawa pembelaan perayu hanyalah penafian semata-mata dan akibatnya, perayu didapati bersalah atas kedua-dua pertuduhan. Perayu dijatuhi hukuman mati bagi pertuduhan pertama dan bagi pertuduhan kedua, perayu dijatuhi hukuman penjara dua tahun dan tiga sebatan. Pada mulanya, perayu telah memfailkan rayuan terhadap keputusan berhubung kedua-dua pertuduhan tersebut tetapi kemudiannya, perayu menarik balik rayuannya terhadap keputusan hakim bicara yang bijaksana berkenaan dengan pertuduhan kedua. Oleh itu, rayuan semasa hanya berkaitan dengan keputusan hakim bicara yang bijaksana berkenaan dengan pertuduhan pertama. Perayu berhujah bahawa: (i) hakim bicara yang bijaksana gagal menjalankan penilaian maksimum terhadap saksi utama pendakwaan; dan (ii) pihak pendakwaan tidak dapat membuktikan jagaan dan kawalan ke atas dadah yang dirampas di bilik ketiga tersebut memandangkan terdapat kemungkinan orang lain boleh masuk ke bilik tersebut.

Diputuskan, membenarkan rayuan, mengenepikan perintah Mahkamah Tinggi dan membebaskan dan melepaskan perayu:

(1) Mahkamah bersetuju dengan perayu bahawa hakim bicara yang bijaksana gagal menjalankan penilaian maksimum terhadap saksi-saksi utama pendakwaan. Hakim yang bijaksana telah banyak bergantung kepada keterangan SP6 yang sebenarnya merupakan penyewa rumah tersebut dan oleh itu terdapat kemungkinan SP6 mempunyai motif ketika memberikan keterangan sebagai saksi pendakwaan. Tiada keterangan untuk menyokong fakta bahawa SP6 sememangnya telah

pergi ke Johor pada 10 Mei 2017 dan masih berada di Johor ketika perayu ditahan. Tiada juga keterangan yang boleh membuktikan bahawa perayu telah mengambil kunci daripada SP6 untuk mengesahkan keterangan SP6 bahawa dia memberikan kunci rumah tersebut kepada perayu berhampiran rumah pengawal pangsapuri (lihat perenggan 34 & 36).

(2) Keterangan SP6 perlu dinilai dengan teliti kerana dia mungkin mempunyai motif berdasarkan fakta bahawa dialah yang menyewa rumah tersebut. Jika dadah tersebut miliknya, dia akan membuat cerita yang boleh menyelamatkan dirinya. Di samping itu, laporan DNA mengenai bilik ketiga tersebut menunjukkan bahawa terdapat dua lelaki penyumbang DNA di mana perayu dikecualikan. Berdasarkan dapatan-dapatan di atas, mahkamah mendapati pihak pembelaan telah berjaya menimbulkan keraguan munasabah yang menyebabkan sabitan perayu tidak selamat (lihat perenggan 37–38).

(3) Sudah menjadi undang-undang yang mantap bahawa pihak pendakwaan bertanggungjawab untuk mengecualikan kemungkinan akses oleh orang lain ke tempat di mana dadah ditemui. Dalam kes semasa, hakikat bahawa rumah tersebut disewa oleh ramai individu yang boleh keluar masuk tanpa apa-apa kawalan dan pengawasan tidak boleh dipandang remeh. Selain itu, tiada analisis cap jari dijalankan oleh polis berhubung dadah yang dirampas. Analisis cap jari adalah sangat penting untuk menunjukkan hubungan dadah dengan perayu dan itu akan membantu kes pendakwaan dalam menghapuskan kemungkinan akses oleh orang lain ke tempat penemuan terutamanya dalam kes semasa di mana pada masa perayu ditangkap, terdapat dua lelaki Arab yang turut ditahan di rumah tersebut dan fakta ini dibuktikan dengan keterangan SP7 dan laporan tangkapan. Berdasarkan dapatan-dapatan di atas, mahkamah mendapati perayu telah menimbulkan keraguan munasabah terhadap kes pendakwaan dalam pembelaan mereka berkenaan isu jagaan dan kawalan (lihat perenggan 39–41).]

Cases referred to

Abdullah Zawawi bin Yusoff v PP [1993] 2 MLJ 1, SC (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)

Legislation referred to

Dangerous Drug Act 1952 ss 2, 6, 37, 37(d), 39B(1)(a)
Evidence Act 1950 s 8

Appeal from: *Pendakwa Raya lwn Legentheraj a/l Asogan* [2020] MLJU 1327 (High Court, Shah Alam)

N Sivananthan (with Grace S Nathan) (Sivananthan) for the appellant.
Parvin Hameedah (with Zaki Asyraf bin Zubir) (Attorney General's Chambers) for the respondents.

Azman Abdullah JCA (delivering judgment of the court):

INTRODUCTION

[1] There are two separate appeals before this court emanating from the decision of the High Court dated 23 December 2019 in convicting and sentencing the appellant on the two charges, namely:

(a) Criminal Appeal No B-05(M)-6–01 of 2020 is pertaining to the charge under s 39B(1)(a) of the Dangerous Drug Act 1952 ('first charge'). The first charge reads as follows:

> Bahawa kamu pada 15hb Mei 2017 jam lebih kurang 7.30 malam di alamat A-8-2, Kondominium Unipark, Jalan US1 Off J, Taiwan Unipark Suria di dalam Daerah Sepang di dalam Negeri Selangor, telah didapati mengedar dadah berbahaya iaitu jenis Cannabis seberat 652 gram. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum dibawah Seksyen 39B(2) Akta yang sama.

(b) Criminal Appeal No B-05(SH)-8–01 of 2020 is pertaining to the charge under s 6 of the Dangerous Drug Act 1952 ('second charge'). The second charge reads as follows:

> Bahawa kamu pada 15hb Mei 2017 jam lebih kurang 7.30 malam di hadapan luar rumah alamat A-8-2, Kondominium Unipark, Jalan US1 Off J, Taman Unipark Suria di dalam Daerah Sepang di dalam Negeri Selangor, telah didapati dalam milikan kamu dadah berbahaya jenis Cannabis anggaran berat 45 gram. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 6 Akta Dadah Berbahaya 1952 yang boleh dihukum dibawah Seksyen 39A(1) Akta yang sama.

[2] At the conclusion of the trial, the learned trial judge found the appellant guilty on both the charges. The appellant was sentenced to death by hanging for the first charge and for the second charge, the appellant was sentenced for two years imprisonment from the date of arrest with three strokes of whipping.

[3] Aggrieved with the conviction and sentence, the appellant appealed to this court and we heard both appeals on the 5 April 2022. However, for Criminal Appeal No B-05(SH)-8–01 of 2020, the appellant applied to withdraw the appeal. Therefore, the appeal was struck out.

[4] We proceed to hear Criminal Appeal No B-05(M)-6–01 of 2020 and at

the conclusion of the submission, we find merit in the appeal and allowed the appeal. We now provide our reasons for the decision.

THE PROSECUTION'S CASE

[5] The prosecution's case was established by the evidence of its witnesses and accepted by the learned trial judge. The gist of the facts of the case for the prosecution may be summarized as follows.

[6] On 15 May 2017, ASP Nasrul Yamani ('SP7') as the head of the raiding team had received information on drug related activities. At around 6pm, SP7 and his team headed to the house located at No 7, A-8-2, Blok A, Tingkat 8, Kondominum Unipark ('the house').

[7] SP7 and his team arrived at the condominium at about 7pm. They took the elevator up to the eighth floor and headed towards the house. Then, they waited for around ten minutes outside the house. Between those ten minutes, SP7 and his team did not see any movement coming into or out from the house.

[8] However, not long after that, SP7 and his team saw an Indian man, the appellant who come out from the house. SP7 and his team approached the appellant and introduced themselves. The appellant looked scared and worried when being arrested.

[9] SP7 at that time seized two house keys from the hands of the appellant. A body search was conducted on the appellant and SP7 found the following:

(a) at the right front pocket of the appellant's black jeans trousers — two compressed slabs of cannabis;

(b) at the left front pocket of the appellant's black jeans trousers — one compressed slab of cannabis; and

(c) at the left front pocket of the appellant's green shirt — one plastic packet with the words 'Poliklinik Public' and in the plastic there was one compressed slab of cannabis.

[10] SP7 and his team continued to go into the house and searched the house. The house had four rooms. All the rooms were locked and unoccupied. A search at the third room was done. SP7 used one of the keys from the appellant to unlock the room. 64 compressed slabs of cannabis were found on a writing table in that room (exh P8(b)(1)–(64)).

[11] SP7 also found three knives of various brands on the writing table, one

piece of note on buying and selling of drugs, one TNB electric bill, one Samsung Galaxy Note 2 phone and one bath towel.

[12] The appellant was then arrested for further investigations.

FINDINGS OF THE LEARNED TRIAL JUDGE AT THE CLOSE OF THE PROSECUTION'S CASE

[13] At the end of the prosecution case, the key findings of the learned trial judge are best sum up as follows:

(a) the prosecution had succeeded in proving the ingredients of the crimes. The learned trial judge held as follows:

> Di akhir kes pendakwaan bagi kedua-dua pertuduhan yang dihadapkan ke atas tertuduh, setelah mahkamah ini membuat penilaian maksima ke atas keterangan pihak pendakwaan dan juga kredibiliti saksi-saksi pendakwaan, mahkamah ini berpuas hati dan mendapati pihak pendakwaan telah berjaya membuktikan inti pati kedua-dua pertuduhan yang dihadapkan ke atas tertuduh. Mahkamah ini juga mendapati tertuduh mempunyai kawalan atau jagaan ke atas dadah-dadah berbahaya tersebut. Dengan itu, tertuduh dianggap mempunyai milikan (*presumed possession*) dan juga pengetahuan (*presumed knowledge*) mengenai dadah-dadah berbahaya tersebut berdasarkan anggapan di bawah s 37(d) ADB 1952, sehingga dibuktikan sebaliknya.

(b) at the place of arrest, the dangerous drugs are in the control, custody and knowledge of the appellant. The prosecution has also excluded other people who may have control, custody and knowledge of such dangerous drugs. Therefore, since the custody or control is established, the presumption under s 37(d) of the Dangerous Drug Act 1952 must be invoked unless the other party proves the contrary;

(c) the ingredient of trafficking was established when the appellant keep the drugs on the table at third room. The act of keeping is fall within the definition of trafficking under s 2 of the Dangerous Drug Act 1952. Besides, the amount of dangerous drugs which was seized during the appellant's arrest was much larger than was likely to be used for his own consumption. This was sufficient to lead to a strong and irresistible inference that the purpose for which the appellant was in possession of the drugs was to transfer the possession of the drugs to another party;

(d) no break in the chain of evidence from the beginning it was seized from the appellant and then analysed by both government chemists (SP1 and SP2) and afterwards presented in court for identification by prosecution witnesses; and

(e) the learned trial judge, during the proceeding also had dismissed the application made by the appellant's counsel challenging the credibility of SP7. The learned trial judge ruled that SP7 was a reliable witness and SP7's reliability is unchallenged.

[14] The learned trial judge found a prima facie case had been established by the prosecution and ordered the appellant to enter his defence.

DEFENCE

[15] The appellant gave his evidence on oath.

[16] The appellant in his defence claimed that he was arrested in front of his friend's house, Saktisen Nair a/l Balakrishnan ('SP6') while waiting for his friend. According to the appellant, he did not have the keys for the house.

[17] The appellant contended that he did not keep any drugs on his body. According to the appellant, at the time of the arrest, there are two Arab males and one of them had opened the house door. The police then brought the appellant in together with the Arab males. The appellant denied giving direction to the place where the drugs were kept. The appellant do not live in the house and only know his friend SP6 who live in that house as the tenant of the third room.

FINDINGS OF THE TRIAL LEARNED JUDGE AT THE END OF THE DEFENCE'S CASE

[18] At the conclusion of the trial, it was the finding of the learned trial judge that the defence had failed to cast a reasonable doubt on the prosecution's case and the defences raised were bare denial. Consequently, the learned trial judge convicted the appellant for the offence as per the charges.

[19] The learned trial judge, in coming to his decision, held as follows:

(a) on the defence that the appellant was arrested while he was outside of the house and not while leaving house, this version is not accepted by the High Court because it fell fails to cast any reasonable doubt. The one that appellant said to be waited for, SP6, was not around at the time of arrest as he was already at his hometown Segamat. SP6 also had given his evidence that he had passed the keys to the appellant before leaving to his hometown on 10 May 2017. SP7 confirmed that the keys had been seized from the appellant at the time of arrest;

(b) the defence counsel argued that there is no observation made by SP7 and raid team at the time of arrest. However, this is not accepted by the

learned trial judge. Evidences from SP6, SP7 and SP8 clearly showed that the appellant did not give the right statement in his defence;

(c) the appellant raised the fact that there are two Arab males and SP7 had instructed one of the to open the house. Based on the Police Report in exh D46, the Arab males who was also arrested by SP7 are Abdalla Mohamed Hassan Hag Ahmed (Sudan nationality) dan Bashar Ali Abdullah AlSowadi (Yemen nationality). Bashar Ali Abdullah AlSowadi had gave his statement as SP11. In this regard, SP7 had given a clarification that no action was taken against the Arab males because they did not commit any offence. The learned trial judge held that SP11 is a credible witness and his evidence is accepted by the court;

(d) the appellant's counsel also contended that the appellant had no knowledge about drugs that was found in the third room because he was at the living area at the time of search. The learned trial judge was of the view that from the date SP6 gave the keys to the appellant on 10 May 2017 until the date of arrest, the appellant was in control, custody and knowledge about the seized cannabis drugs. In fact, four of compressed slabs of cannabis was found on the appellant's body. All four compressed slabs of cannabis were the same with 64 others which were found in the third room. Thus, that should not be accidental;

(e) the defense counsel for the appellant also argued that evidence from SP6 must be given careful consideration which this court cautions. The third room was rented by SP6 in which the 64 compressed slabs of cannabis were found in that room. The learned trial judge held that SP6 was a credible witness and his testimony was accepted by this court. Evidence given by SP6 was supported by the evidence from SP7 and SP8. Besides, SP6 is a good friend of the appellant and there is no reason for SP6 to create the story and to blame the appellant;

(f) on the issue raised by the defence that the chain of evidence has been broken when the prosecution failed to call the agent who according SP3, the owner of the house, the rent was handled by the agent, the learned trial judge was of the view that the agent is not a material witness. The prosecution case was *has* completed with overwhelming evidence. There is no material gap in the prosecution's case. The prosecution has successfully excluded any involvement of others in the possession and distribution of the drugs. The appellant was the one who has control and custody of the drugs found in the pocket of his shirt and jeans as well as on the desk in the third room of the house;

(g) the defence also called the appellant's farther, SD2, to give evidence that the appellant who studied at UNITEN, never live in a rented house or

rent a room. However, this was not accepted by the learned trial judge who was of the view that the statement from SP6 shows that the appellant was looking for a room to rent;

(h) defence counsel of the appellant also contended that the appellant has no control, custody and knowledge about the drugs and other might have access to the drugs. However, the learned trail judge was of the view that the appellant has failed to rebut the presumption of possession and knowledge of such dangerous drugs under s 37(d) of the Dangerous Drug Act 1952;

(i) the appellant's fearful, agitated and sweating behavior during the arrested was also relevant and admissible by this court under s 8 of the Evidence Act 1950 to show that his knowledge of seized drugs;

(j) since the appellant alone was detained by SP7 at the house with compressed slabs of the cannabis, the High Court held that there was no need for fingerprint analysis to be conducted. The appellant has been proven to have control, custody and knowledge of drugs; and

(k) it was also satisfied that there is no doubt about the identity of the drugs presented by the prosecution. Reports by the chemists has confirmed the identity the drugs.

THIS APPEAL

[20] The appellant raised 53 grounds of appeal in his petition of appeal which were compressed into four main grounds and submitted before us as follows:

(a) failure to conduct maximum evaluation of key prosecution witnesses;

(b) no knowledge, custody and control;

(c) incorrect application of presumptions; and

(d) failure to consider the defence.

ISSUES RAISED BY THE APPELLANT

Ground one: Failure to conduct maximum evaluation of key prosecution witnesses

[21] The learned counsel for the appellant submitted that the conviction against the appellant was based largely on the oral testimony of SP6, SP7, SP8 and SP11 wherein the learned trial judge erred when he failed in toto to evaluate the oral testimony in respect of contradictions in the documentary evidence, oral evidence of other prosecution witnesses and other factual and

A circumstantial evidence that formed the basis of the prosecution's case. Such failures rendered the conviction of the appellant unsafe and caused a miscarriage of justice.

B **[22]** In this regard, there are few points highlighted by the counsel for the appellant as follows:

(a) the table on which the drugs were found had many marks consistent with the usage of knives. The prosecution tried to show that the marks were made by the appellant in the absence of SP6. However, in
C cross-examination, SP6 confirmed that he was unsure if those marks had been there all along or if they were new;

(b) there was no evidence to corroborate the fact that SP6 indeed left for Johor on the 10 May 2017 and was still in Johor at the time of the incident. Although he produced what was alleged to be a bus ticket
D during the trial this was never marked as an exhibit. He could have returned at any time on or before the date of the arrest;

(c) the clothing items seized from the third room clearly belonged to more than one person wherein there were medium sized clothes as well as
E extra-large clothes seized by the police;

(d) the fact that there was more than one person staying in that third room at the time of arrest was supported by the fact that the DNA report which showed two male contributors to the DNA from which the
F appellant was excluded;

(e) SP11 was the main tenant in the unit. SP11 claimed that he was arrested in his room as opposed to outside the house per his arrest report. SP10 testified that SP7 never told her about the arrest of SP11 and 'Mohammad' when she recorded his statement. She also stated that she
G had never seen SP11's arrest report. According to SP10, had she known about SP11 and Mohamad she would have arrested them and investigated all three of them together and she would have sent all their DNA for analysis;

H (f) it cannot be ruled out that the door of the third room was not locked and it also cannot be ruled out that the keys discovered inside the third room were merely a spare set of keys for the room given that the owner of the house (SP3), SP6 and SP11 had ail testified that many people stayed in the unit, many people came and went and there was no real way to
I determine how many duplicate sets of keys existed for the third room;

(g) counsel for the appellant also questioned the credibility of Raiding Officer, SP7 in which during cross-examination, SP7 testified that that the appellant was the only one he arrested. However, when counsel for the appellant tendered SP11's Arrest Report which was made/lodged by

SP7 himself, he then confirmed that. Counsel for the appellant then applied to impeach SP7 in which the learned trial judge held that he found the explanation proffered by SP7 was reasonable and therefore his credit was saved;

(h) additionally, during cross-examination SP8 who was also a member of the raiding team, he was unable to corroborate SP7 in material particulars as follows:

(i) SP8 admitted that he did not see the appellant coming out of the unit; and

(ii) SP8 admitted that he did not see where the keys were seized from.

(i) in this regard, the learned trial judge failed to apply his mind to the legal principle and accordingly failed to draw the inference that the keys were in fact found inside the third room and not seized from the appellant.

Ground two: No knowledge, custody and control

[23] According to the counsel for the appellant, in relation to the drugs found in the third room, given that it has now been shown that based on the parole evidence rule, that the appellant was outside the unit at the time of the arrest and that the keys were actually seized from inside the third room, therefore it was submitted that the prosecution is unable to prove custody and control. The appellant's version that no key was seized from him is corroborated by both the First Information Report ('FIR') and the Second Search List.

[24] In this regard, the prosecution failed to exclude access by others to the third room in the unit. The prosecution narrative led by SP6 was that Mohamad lived in the third room and had a set of keys. SP7 also attested a person named Mohamad. However, the prosecution did not lead even an iota of evidence regarding who Mohamad is. Mohamad was not called as a witness nor was he offered to the defence. This left an irreparable gap in the prosecution's case.

[25] Besides, there were also multiple versions led by several prosecution witnesses about the number of people who had access to the third room. SP6 testified that potentially up to seven people could access the third room. SP11 on the other hand testified that he had seen a dark-skinned Indian boy and a dark-skinned Indian girl frequenting the third room. Both SP6 and SP11 could not confirm how many former tenants or current tenants had keys to the house and/or the third room. Nor could they confirm how many duplicates had been made and circulated over time.

[26] Counsel for the appellant also submitted that there is documentary evidence to show that the appellant did not stay in the unit given that none of his personal items were found in the third room and nor was his DNA found in the said room. Although SP7 testified that the appellant looked nervous and scared at the time of his arrest, it is submitted that it is a natural reaction to be nervous and scared when suddenly ambushed by a group of men in plain clothes. There is no evidence that the appellant resisted arrest, put up a struggle or tried to run away from SP7 at the time of the arrest. This we submit is conduct consistent with innocence.

[27] With regard to the drugs founds in the appellants pockets, it was submitted that given that the credibility of SP7 is in serious doubt and the documentary evidence shows that the appellant was never inside the unit, it follows that it is also entirely possible that the appellant's version that no drugs were ever recovered from his person is highly plausible. The appellant submitted that it is more likely that the medicine packet with SP6's name on it was actually found inside the third room as opposed to inside the appellant's shirt pocket. There is no logical reason for the appellant to have one medicine packet containing drugs with SP6's name on it in his shirt pocket especially if the other three blocks of cannabis allegedly found in his pants pockets were not in any special type of packaging.

[28] Further, the appellant submitted that although the appellant's pockets were searched, yet other items that would usually be found in one's pocket, such as a wallet, identity card, driving licence, motorbike keys and cell phone that ought to have been seized, were not seized. Therefore, there is a real and serious doubt as to whether any drugs were ever seized from the appellant's person.

Ground three: Incorrect application of presumptions

[29] The learned trial judge had made a direct finding of possession and knowledge on the facts led by prosecution when he held that prosecution had proved possession and knowledge. Thus, the learned trial judge went on to invoke the presumption of possession and knowledge under s 37(d) of the Dangerous Drug Act.

[30] In this regard, the counsel for the appellant submitted that it is trite in law that a presumption is only invoked when there is no direct evidence of the same. It is also trite in law that when a presumption is invoked there is a burden on the defence to rebut the presumption on a balance of probabilities whereas if a presumption is not invoked the appellant merely has to cast a reasonable doubt on the prosecution's case. The former burden is a higher burden. In the present case the judge has simultaneously imposed both burdens on the

appellant which had occasioned a grave prejudice upon the appellant. This could have been avoided should the LTJ have relied solely on direct evidence of possession and knowledge which the prosecution had allegedly proven. This has rendered the conviction unsafe.

Ground four: Failure to consider the defence

[31] It is the submission of the appellant that the defence had successfully raised a reasonable doubt in the prosecution's case and that the presumption invoked (if any) under the Act was successfully rebutted. There was no specific finding of trafficking at the end of the defence case. The learned trial judge merely held that the prosecution had proved its case beyond a reasonable doubt and that the presumption of possession and knowledge under s 37 of the Dangerous Drug Act had remained unrebutted at the end of the trial.

[32] In this regard, counsel for the appellant submitted that the learned trial judge erred when he labelled the defence of the appellant as a bare denial. The learned trial judge failed to appreciate that the appellant's version of events was the only constant version of events throughout the trial. The witnesses' integral to the unfolding of prosecution narrative repeatedly contradicted their own documentary evidence and no two prosecution witnesses corroborated each other on the material particulars.

[33] Besides, the fact that the keys may have been seized from one of the Arab men or that it had been inside the third room all along were merely possibilities for the prosecution to rule out. The burden to prove their case beyond a reasonable remained theirs until the end.

OUR DECISION

[34] With regard to the first ground raised by the appellant that the learned trial judge failed to conduct maximum evaluation of key prosecution witnesses, we agree with the submission of the appellant's counsel. We are of the view that the learned trial judge had much relied on the evidence of SP6 who is in fact the tenant of the unit and therefore there is a possibility of SP6 having a motive when giving the evidence as prosecution witness.

[35] We refer to the case of *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 which held as follows:

> Generally, an appellate court will not intervene unless the trial court was shown to be plainly wrong in arriving at its decision or where there had been no or insufficient judicial appreciation of the evidence. Judicial appreciation of evidence meant that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or

rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, *he must take into account the presence or absence of any motive that a witness may have in giving his evidence.* Where contemporary documents existed, he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. The principle central to appellate interference is that a decision arrived at by a trial court without judicial appreciation of the evidence may be set aside on appeal.

[36] Besides, when we evaluated the facts and evidence relating to SP6, we found that there was no evidence to corroborate the fact that SP6 indeed left for Johor on the 10 May 2017 and was still in Johor at the time of the arrest. There was also no evidence which can prove that the appellant had collected the key from SP6 to corroborate the evidence given by SP6 that he gave the keys to the unit to the appellant near the guardhouse of the Unipark Condominium.

[37] With regard to SP6, we are of the opinion that his evidence needs to be carefully evaluated since he may have the motive based on the fact that he is the one who rented the house. If the drugs belong to him, definitely, he will come out with the story which can save him. Besides, the DNA report concerning the third room showed that there are two male contributors to the DNA from which the appellant was excluded. Therefore, the question arose as to whom the DNA belongs to?

[38] Based on this, we are of considered view that the defence had succeed in raising a reasonable doubt which render the conviction of the appellant to be unsafe.

[39] On the second ground raised by the appellant that the prosecution was unable to prove custody and control of the drugs seized in third room, it is trite principle that the onus is on the prosecution to exclude the possibility of access by others to the place of discovery (see *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 2 MLJ 1).

[40] However, we find that the appellant had raised a reasonable doubt against the prosecution case in their defence on the issue of custody and control. In this regard, we are mindful with the decision in the case of *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 whereby the Supreme Court stated:

It is a well-established principle of Malaysian criminal law that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charged. There is no similar burden placed on the accused to prove his innocence. He is presumed innocent until proven guilty. To earn an acquittal, his duty is merely to cast a

reasonable doubt in the prosecution case. In the course of the prosecution case, the prosecution may of course rely on available statutory presumptions to prove one or more of the essential ingredients of the charge. When that occurs, the particular burden of proof as opposed to the general burden, shifts to the defence to rebut such presumptions on the balance of probabilities which from the defence point of view is heavier than the burden of casting a reasonable doubt, but it is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt. *To earn an acquittal at the close of the case for the prosecution under ss 173(f) or 180 of the Criminal Procedure Code, the court must be satisfied that no case against the accused has been made out which if unrebutted would warrant his conviction* (*Munusamy v Public Prosecutor* [1987] 1 MLJ 492). *If defence is called, the duty of the accused is only to cast a reasonable doubt in the prosecution case. He is not required to prove his innocence beyond reasonable doubt.*

[41] The fact that the unit was rented by many personal who can go in and out without any control and supervision should not be taken for granted, Besides, there is no fingerprint analysis been conducted by the police with regard to the drugs seized which in our opinion such analysis is very important to show the nexus of the drugs with the appellant and that will help the prosecution case in eliminating the possibility of access by others to the place of discovery especially in the present case whereby at the time the appellant was arrested, there are other two Arabs who was also been arrested at the unit and this fact was corroborated with the evidence from SP7 and the arrest report.

CONCLUSION

[42] In the upshot, having perused the appeal records, the grounds of judgement and the written submissions by parties, we unanimously find that the appellant had succeed in raising a reasonable doubt against the prosecution case. We find that there are gaps in the prosecution case.

[43] Accordingly, for Criminal Appeal No B-05(M)-6–01 of 2020, we allowed the appeal and the order of the High Court is set aside. The appellant is acquitted and discharged.

Appeal allowed; order of High Court set aside; appellant acquitted and discharged.

Reported by Dzulqarnain Ab Fatar